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Whiteside & Associates
Transportation & Marketing Consultants

December 13, 2000

Office of the Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

Attn: Ex Parte No. 582 Sub No. 1: Major Rail Consolidation Procedures

Dear Mr. Secretary:

Pursuant to the Notice of Proposed Rule Making on October 3, 2000 in the above-described proceeding, please find enclosed the original and twenty-five copies of the Comments of Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission referred to as the **Wheat, Barley and Grains Commissions**.

Also please find enclosed an IBM compatible floppy diskette electronic copy of the enclosed statement.

Please receipt duplicate copy and return in the self-addressed stamped envelope for our records.

Respectfully submitted,

Terry C. Whiteside

Terry C. Whiteside
Registered Practitioner representing
Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission

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REPLY COMMENTS
of
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION

STB Ex Parte No. 582 (Sub-1)
Major Rail Consolidation Procedures
December 18, 2000

The above listed parties, referred to as the Wheat, Barley & Grains Commissions, herewith submit their reply comments on Notice of Proposed Rule Making in the above-styled proceeding issued by STB on October 3, 2000.

BACKGROUND

The Wheat, Barley & Grains Commissions believe the Board is obligated to look at the problems of rail consolidations and the market dominance created by past merger policy procedures because this country will be faced, within months, with merger applications to create a two-railroad system. The public interest component of this proceeding must be embodied in the view that the railroad system's future viability does not rest in becoming more dominant but rather this Board recognizing that interests of the payers of freight must be accommodated before the railroads will see future growth of their top line. The most pressing question and the heart of this rule making is what is best to address the public interest. In our mind, every rail customer and the public at large needs a competitive rail transportation system that provides fairly priced, safe and reliable service. The Board to 'protect' the railroad industry has created a system that has resulted in a rail system fraught with service problems, customer suffering, and rate gouging. As previously stated, the reality, due to an overly consolidated rail industry, is the railroad industry is characterized by lack of competition among the nation's railroads; whole states and complete industries are captive to a single railroads; and there have been thousands of cases of market abuse testified to at various STB hearings in the last several years.

ENHANCEMENT OF COMPETITION MUST BE ATTENDED TO NOW BEFORE THE START OF THE END GAME

The Board was correct in its initial view that competition must be enhanced to serve the public interest. The railroads in their comments want this Board to <u>not</u> consider 'downstream' effects in evaluation of future railroad mergers. Given that a two-monopoly continent-wide railroad system will be the inevitable result of the next round of mergers, to not evaluate all downstream effects even if such evaluation involves speculation of future proposed mergers is too important not to be considered. The proposed look at downstream effects is what has been missing from national rail merger policy for the last 30 years. We, in this nation, are faced with two railroads controlling thousands of rail customers in the near future. The public interest requires that the STB meet the needs of the rail customers by finally becoming a proactive force for enhancing competition. If the STB doesn't actively work to enhance competition among railroads, there may be nothing left for the STB to oversee. There is growing and continuing evidence of market power abuse and continuing abysmally poor levels of customer service. The STB needs to be clear and specific on its rules. The courts require it.

Competition is the only means for achieving the kinds of efficiencies that will deliver a healthy and strong rail industry into the 21st century. Top line growth in railroad revenues will occur when rail customers' needs are being more effectively met. They will only be effectively met when railroads have to compete for right to serve the American shipping public.

The Wheat, Barley & Grains Commissions need a strong, vibrant railroad system and worry that if this STB does not move aggressively towards enhancing competition, the railroad system will never develop the innovation required to keep abreast and start to meet present and future consumer needs.

Further, if the STB does not increase competition within the railroad industry, the continuation of today's inefficient, uncompetitive and service constrained railroad system, which will likely be further competitively impaired through additional mergers creating a transcontinental two-railroad monopoly system will potentially force Congress toward reregulation, which is contrary to the pro-competitive approach that has been supported by virtually every captive rail customer over the last few years.

The railroads suggest that the Board should not allow for the STB to be able to further condition mergers after a merger is consummated. Such an approach is contrary to the public interest and ignores the Board's statutory authority to act to mitigate post-merger problems. In fact, clearly defined post-merger conditioning is particularly appropriate in light of recent history which has shown that the nation's railroads have made many promises in past mergers that have never materialized. The industry claims it need 'certainty' in mergers. Indeed, the certainty should be reserved for those paying the freight bills and bearing the costs associated for failure and anti-competitiveness of the merger.

The railroads further state that the proposed rule 49 C. F. R. § 1180.1 (c) (1) NPR at 14 wherein the STB wants the applicant railroads to propose how they would be held accountable for the benefits and service improvements they claim in their merger applications is too harsh. The BNSF in their statement page 47, states, "The threat to impose additional conditions if projected public benefits are not met is bad public policy." What a concept. If the projected public benefits are not met, the ultimate payer under current STB policy is the rail customer. If the railroads promise too much to get their merger approved, and then don't perform, they want to brand as 'bad public policy' any attempt to offset those that are damaged as result of the merged carriers not living up to their promises. No one forces a railroad to make promises they can't keep. The STB doesn't make promises on behalf of the railroads. The captive rail customers who pay for the mergers do not dream up the promises these railroads give. But rail customers are asked and must accept these promises and then pay the consequences. The only 'public policy' that makes sense is to make sure if promises are not met, there will be additional conditions and mitigation. In that way, the railroads will become careful and responsible in their projections and not promise things like 'taking a 1,000,000 truckloads off the highways' and instead providing such poor service that probably 1,000,000 truckloads were put on the highways. The merging carriers who stand to make greater profits due to the merger should be required to mitigate those rail customers who are placed at an economic disadvantage due to the merger. The disadvantaged rail customers have done nothing to 'earn' this disadvantage and the parties enjoying an advantage over these customers should be required to mitigate the economic disadvantages that they are creating.

Regulatory monitoring has not proven to mitigate or prevent economic damage to this nation's rail customers, or the nation as a whole. Once a merger has failed a rail customer and the damage has been done, no amount of monitoring is going to undo the damage. What must be provided is economic incentive/disincentives to make sure the railroad promises are kept. Monitoring alone won't do that. What is needed are economic penalties for non-performance by the railroads that, coupled with the economic incentives to complete the merger, will tend to serve the rail customer as promised.

Focusing the regulations on the effects of a merger is good public policy. With rights to economics flowing from a railroad merger must also flow for the effects of not living up to the responsibility of delivering on promises. Rights of economic gain should not come without responsibility.

The BNSF railroad also states that the "Board should not dictate the structure of future business relationships." Proposed 49 C.F.R § 1180.1 (c) NPR at 12-13 when assessing whether a merger is in the public interest, the Board will consider whether the claimed benefits could be realized in other ways such as joint marketing ventures, alliances and other mechanisms. The BNSF suggests railroads choose mergers over alliances and other types of voluntary coordination agreements because mergers are likely to achieve the efficiencies they need. The reality is that one of the reasons the railroad would prefer mergers to alliances is that the railroads in mergers can more effectively control the marketing of a railroad partner than in an alliance. They can also realize much greater market dominance over the involved rail customers. The railroad efficiencies are greater in a merger because there is more resultant captivity. Because of the fact that mergers result in greater captivity of the railroad customers, the standards for an applicant to meet should be greater in a merger proceeding. The ever decreasing number of Class I railroads and the lack of intra-modal competition empowers the railroads to behave in ways that control markets and entire industries. After years of mergers in the western U.S., the railroads have a history of discouraging economic development and stifling value-added industrial base drives by agricultural based states such as Idaho, Colorado, Oregon, North Dakota, South Dakota, Montana, and Nebraska.

In proposed Section 1180.6 (b)(10) the NPR proposes that merger applicants must demonstrate how the use of major gateways will be preserved. The BNSF in their Comments suggest that these gateway points should apply only to points directly affected by the merger and there is no merger-related policy basis for extending this requirement to gateways not affected by a merger. The effects of past mergers have clearly shown that elimination of gateways downstream from rail customers have served to further isolate captive rail customers in successive mergers. The railroads want to increase dominance over already captive rail customers on their systems with each successive merger by closing more and more gateways and ever more limiting routes. This nation is faced with the end-game of a two-railroad system for the North American continent. This Board must become the advocate for the ever-increasing number of captive rail customers for which they are responsible for helping to create. This nation does not need any further lessening of major gateways in this country. To allow the railroads to eliminate gateway points allows further lessening of rail-to-rail competition in this country. Look at the history of the past several rail mergers. They have not significantly improved service. They have not increased or even maintained existing competition levels in the market place. They have not resulted in lower rates—despite aggregated revenue per-ton mile data that is erroneously used to suggest that they have. They have not resulted in increased efficiency for many of their customers. However, they have resulted in widespread service disruptions, closed gateways, and increased transportation costs for rail customers. The costs associated with service disruptions go far beyond the loss of revenue to the rail customer. Loss of business to the rail customer equates to loss of employee wages, lost sales and market share, increased trucking which costs local and state government in excessive repairs to highway infrastructure, and attendant local air pollution. These increased costs and losses ripple throughout the local economies. The rail customers are not the ones who should be paying for these rail mergers. The railroads merge to increase revenues and bottom lines. In the event that a merger hurts a rail customer, they should be compensated.

In the AAR Comments they state "increased reliance on regulatory mandates to restructure competition in the rail merger context would correctly be perceived as a step toward economic regulation of the industry" page 4. The Wheat, Barley & Grains Commissions believe this statement clarifies the railroad position well. This nation's railroads argue out of both sides of their mouth. Railroads argue that government intervention is necessary to insure that they earn "adequate revenues." At the same time, railroads argue that no government intervention is necessary to limit their monopoly power!

The AAR on page 6 of their Comments suggests that the Board's proposed change in policy in this proceeding would, "represent an unfortunate shift away from reliance on market forces, which was the defining character of Staggers Act regulatory reforms, to a much greater emphasis on regulatory judgment and intervention." This country is faced with the greatest concentration of railroad monopoly power it has ever seen in its history. The Staggers Act when implemented was instituted in a country that had over 40 Class I railroads. The idea was that competition among and between these 40+ Class I railroads would provide the surrogate for reducing regulatory oversight. The Staggers Act never envisioned that the 40+ Class I railroads would be allowed to merge in 20 years to 4 majors. The policies that must be adopted in this proceeding have to deal with the reality of today's railroad concentration environment.

The AAR expressly opposes initiatives by the Board to 'enhance competition.' The AAR further suggests that Board "cannot carry out its statutory mandate to determine whether a particular merger is in the public interest by substituting presumptions for a thorough review of the facts raised by each transaction." The railroad transportation policy outlined in the ICC Termination Act clearly states, "In regulating the railroad industry, it is the policy of the United States Government –

" (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;...

"(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues as determined by the Board;

"(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and national defense;..."[1]

The Wheat, Barley & Grains Commissions continue to believe the Board has not caught the proper balance between the railroads and the public interest in these proposed rules. The Board should adopt merger policies that in all future rail mergers, all rail customers should have the right to rail-to-rail competition as a matter of national rail policy; and for those rail customers that do not have rail-to-rail competition, this Board should adopt a responsible and economically accessible regulatory relief system.

The Board should adopt a pro-competitive stance in every action and decision. It is only in this way, the Board can protect the nation's railroad customers and U.S. industry. It will then be able to oversee an enhanced competitive environment in the coming two-monopoly railroad system.

Submitted by:

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12/13/2000
Date:

For:

MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION

[1] §49 USC 10101. Rail Transportation Policy

CERTIFICATE OF SERVICE

I hereby certify that the above described Comments of the Wheat, Barley & Grains Commissions has been duly served on all Party of Record identified on service list via first class mail in the United States Postal Service this 13th day of December, in the USPS station in Billings, Montana 59101.

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